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In The
Supreme Court of the United States

October Term, 1959

No. 478

O. Q. KIZZIAR AND MILDRED KIZZIAR, His Wife,

Petitioners,

VERSUS

B. L. DOLLAR, doing business as B. L. DOLLAR CONSTRUCTION COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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OCTOBER, 1959

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, O. Q. Kizziar and Mildred Kizziar, his wife, respectfully pray for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the judgment entered by that court in this case, on July 23, 1959, being numbered 5987 in said Court of Appeals.

A certified transcript of the record of the case in the Court of Appeals, including record on motion of petitioners to access costs against respondents, and a certified copy of the proceedings in the District Court as filed in said Court of Appeals, are furnished herewith in conformity with Rule 38 of this Honorable Court.

OPINION OF THE COURT BELOW

The opinion and judgment of the United States Court of Appeals is unoffically reported in 268 F. 2d at page 914. (advance sheet for September 21, 1959.) However the judgment of the District Court, and that Court's Findings of Fact and Conclusions of Law, are shown at pages 92-100 of the Record from the District Court, and the judgment and opinion of the Court of Appeals are shown at pages 3 to 12 of the certified Transcript of Record in the United States Court of Appeals, said opinion and judgment having been entered in said Court of Appeals on the 23rd day of July, 1959. Each judgment and opinion is printed herein as an Appendix.

Thereafter a petition for rehearing was filed in said Court of Appeals by these petitioners, which was denied on the 20th day of August, 1959.

On September 2, 1959, said Court of Appeals entered an order staying the mandate for 30 days, to give these petitioners time to file this petition for writ of certiorari.

Motion of these petitioners to assess the costs of appeal against the plaintiff (respondent here) was denied by the Court of Appeals on September 11, 1959.

STATEMENT OF MATTERS INVOLVED

B. L. Dollar (respondent here) filed suit in June 1957, in the District Court of Jackson County, Oklahoma, against O. Q. Kizziar, in which two actions were joined. The first cause of action was to recover on a written contract for the construction of a building in Altus, Jackson County, Oklahoma, known as the Srigley Clinic, the contract price being $20,000.00; and also on an alleged subsequent oral contract for the lengthening of said building at an alleged price of $2,863.50. Plans and specifications were drawn (R. 37-41, District Court) and made a part of the written contract (R. 41). Foreclosure of a mechanic's lien against the property was also sought, and Mildred Kizziar, wife of O. Q. Kizziar, and a joint tenant with her husband in the ownership of the real estate on which the building was constructed, was made a party defendant in order to subject her interest in the real estate, to foreclosure of the lien.

The second cause of action was for a balance alleged to be due on a former contract for the erection by plaintiff of the building known as Irby-Bussey Clinic in Altus, Oklahoma, and for certain minor items, totalling $903.60.

Answering the first cause of action, defendants (petitioners here), pleaded that the total contract price was $20,-

000.00, denied any subsequent oral agreement for the lengthening of the building, alleged that the building had not been completed, further alleged that the contract sued upon was an entire and indivisible contract, and that it had not been substantially performed, and that, therefore, plaintiff could recover nothing in this action based solely upon the contract; that in the event plaintiff should be allowed to recover in this action on his first cause of action, he had departed from the adopted plans and specifications, had adopted other and cheaper methods of construction, had wholly failed to perform certain conditions and to make certain installations called for by the contract and specifications, had thereby materially reduced the cost of construction as well as the value and solidity of the building, and that defendants (these petitioners) were entitled to credits on the contract price for these various omissions and deviations which had resulted in a decrease in the cost of construction, which were pleaded as offsets and credits against the contract price (Dist. Ct. Record 11-20).

For answer to the second cause of action, petitioners pleaded that plaintiff had been paid in full by cash and by certain drugs and sundries bought from petitioners by and for plaintiff (respondent).

After suit was filed in the State Court, the United States was made a party defendant because of its lien against the property involved for certain unpaid taxes. The case, upon motion of the United States, was removed to the

United States District Court for the Western District of Oklahoma (R. 10) in which Court the case was tried by the Court without a jury, April 10, 11, 1958. The claim of the United States was paid in full after judgment, and it is, therefore, no longer interested.

After the trial of the case at Lawton, Oklahoma, April 10-11, 1958, the trial Court filed Findings of Fact and Conclusions of Law, (R. 94).

Upon suggestion by the court in his Findings and Conclusions that there was no evidence upon which to base an attorney's fee for plaintiff (who had alleged in his petition that a reasonable fee would be $2,000.00) respondent filed his motion to reopen the case for the introduction of testimony as to attorney's fees; the motion was granted, evidence introduced by plaintiff, and attorney's fee fixed by the court at $2,500.00.

Likewise petitioners filed their motion to reopen the case for the introduction by petitioners of additional evidence, particularly as to the savings effected by the plaintiff, Dollar, in constructing the foundation which he did construct, instead of constructing the foundation called for by the specifications; so that proper credit could be allowed for that sum. The motion was denied by the trial court.

Motion for New Trial was filed by petitioners, in which the Court was again requested to reopen the case for further evidence, but the motion was overruled. (R. 104).

The trial court entered judgment in favor of plaintiff for everything he sued for, and denied all off-sets, counter claims and credits for deviations and omissions from the contract, with two exceptions, i.e.: the court found that the central cooling system as installed was inadequate, and allowed $750.00 credit for the installation of window air conditioners to supplement the inadequate central cooling system; and another credit of $150.00 to convert the 4-ply roof installed by plaintiff to the 5-ply roof called for by the specifications. (See Appendix A).

In the trial court's Findings of Fact (paragraph 14) the court found that "all other deviations from the specifications contemplated by the construction contract were authorized by subsequent agreement of the parties at the time of construction". (R. 95). For that reason, presumably, no credits were allowed for any except the two deviations already mentioned.

On appeal to the United States Court of Appeals for the Tenth Circuit, that court in its opinion (Appendix B), held, among other things, that although the foundation of the Srigley Clinic was not built according to specifications, there was evidence that it was the usual foundation built in that area for that type of building, that it was considered adequate, and that, therefore the contract, as it pertained to the foundation, was "substantially performed", that, although the plaintiff failed to install adequate central heating and failed to consruct a five-ply roof, as called for in

the specifications, yet the contract was substantially performed.

However the Court of Appeals rejected the theory of the trial court that window air conditioners could be installed in lieu of the adequate central cooling system called for by the contract, and found that certain other minor omissions and deviations, illustrated in footnote 2 to the Appellate Court's opinion, were not agreed to by the petitioners, and remanded the case to the District Court for further proceedings and evidence on these two points, and for modification of the judgment accordingly.

But the Appellate Court found that certain other requirements of the specifications were agreed to by plaintiff and defendants and failed to allow credit for the savings to plaintiff made by these deviations and omissions.

Petition for rehearing was filed by these petitioners (pages 14-28, Appellate Court Record), and denied by the Court of Appeals (R. 29).

SPECIFICATIONS OF ERROR TO BE URGED

It is respectfully submitted that the United States Court of Appeals, as well as the United States District Court, erred as a matter of law, in the following particulars:

1. In failing to follow the law of the State of Oklahoma as declared by statute and by decisions of the highest Court of the state with reference to questions involved in the construction and enforcement of a contract made in Oklahoma and to be performed in Oklahoma.

2. In holding that the construction of a foundation 18 inches deep by 14 inches wide constituted "substantial performance" of a contract calling for a foundation 24 inches deep and 37 inches in width

3. In holding that the construction contract and the plans and specifications attached thereto were substantially performed.

4. In failing and refusing to hold that petitioners were entitled to credits for all savings made by deviations and omissions from the contract and specifications for the construction of Srigley Clinic, regardless as to whether such deviations and omissions were agreed to by the parties.

5. In allowing a judgment to stand based in part upon testimony as to oral conversations and tentative agreements prior to the execution of the final written contract and not incorporated in such written contract.

6. The Court of Appeals erred in failing to hold that the trial court had abused its discretion in refusing to reopen the case for the introduction of evidence as to the amount of savings effected by the deviation of plaintiff from the contract specifications as to the type of foundation to be constructed for the Srigley Clinic.

7. The Court of Appeals erred in refusing to assess against respondent petitioners' costs on appeal.

We respectfully submit that each of these specifications of error should be governed by the written contract itself, and the construction of such contract placed thereon by the statutes of the State of Oklahoma, and the decisions of the Supreme Court of Oklahoma.

WHEREFORE, your petitioners respectfully pray that this petition for writ of certiorari be granted.

ARGUMENT

This action is based upon a contract made in Oklahoma and performed in Oklahoma. As held by this Court in *Erie R. R. Co.* v. *Thompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 and subsequent decisions in construing Section 34, Federal Judiciary Act of September 24, 1879, 28 U. S. C. 725 (now, as amended, 28 U. S. C. 1652), such a contract must be construed in harmony with the construction placed upon such a contract not only by the state's written law, but also in harmony with the construction placed upon it by the decisions of the state's highest court—in this instance, the Supreme Court of the State of Oklahoma. The Federal Court, when enforcing such a contract is in substance another court of the state in which it is sitting, and may not depart from the rights which would be accorded the litigants if the case were being adjudiciated in the state courts.

Under many decisions of the Supreme Court of Oklahoma, the contract here involved is an entire, indivisble contract and no recovery can be had on such a contract unless it has been substantially performed. See, for example *Davidson* v. *Gaskill*, 31 Okl. 40, 121 P. 649; *Phoebe-Brisco Co.* v. *Board of Co. Com'rs. of Garvin County*, 108 Okl. 153, 235 P. 468.

The Court of Appeals held in the instant case (Headnote 2) that a contract is substantially performed if "there are no omissions or deviations from the general plan which

cannot be remedied without difficulty." If the Court of Appeals had followed that principle, a portion of the errors of which we complain would have been avoided.

In spite of the fact that the specifications (R. 37) called for a foundation 24" deep and 14 inches wider on each side than a masonry wall 9" thick, or 37 inches in width (R. 37), the respondent constructed a foundation which the witness Appleby, an architect (R. 46) testified was 18" deep and 17" wide, and which respondent himself admitted was 18" deep and approximately 20" wide (R. 33); in spite of the fact that the contract (R. 41) provided that the contractor should furnish all material, he utilized an old foundation on the site, which was owned by petitioners and attempted to tie on a new foundation at each end of the old, thereby causing a settling of the walls of the building (R. 44); in spite of the fact that Barnes, the contractor's brick foreman on this building, testified that in the part of Altus where this building was constructed the soil "slips", and "I would put a heavier foundation under it than in some other parts", and "I have stressed to every builder * * * to put a good foundation under walls in such part of Altus (R. 78-79), the Court of Appeals held that the foundation as constructed was substantial compliance with the contract and specifications, saying, (Headnote) 2) "Builder substantially performed contract to construct building for defendants even though the foundation did not meet the specifications,

where the foundation was standard and adequate for the type of building, and there was no particular reason why the specifications required a different type of foundation."

Under Oklahoma law the owner does not have to buttress his specifications by stating why he prefers French windows to those of the sash type, or why he wants twelve inch walls instead of nine inch walls, or why he wishes a heavy foundation instead of the conventional type. In *Mitchell* v. *Spurrier Lumber Co.*, 31 Okl. 834, 121 P. 10, the Supreme Court of Oklahoma stated the law of Oklahoma with reference to such a situation, as follows:

> "The owner has a right to have built the structure he contracted for, and not another. Even his caprices, if expressed in the contract, must be complied with, and even though they might not have added to the value of the structure, or may have lessened its value."

Again, in the same case:

> "The court cannot say that anything is immaterial which the parties have made material by their contract. One has a right to determine for himself what he deems a good foundation, or what materials he desires used, and, if he contracts for them, neither the contractor nor the court has the right to compel him to accept something else which may be shown by the evidence to be just as good, or even better. * * *"

Many deviations and omissions were found by the trial and Appellate Courts to have been agreed to by the parties, but there is not a scintilla of evidence in the record which remotely hints that there was any agreement to weaken the foundation as was done by the respondent.

The "good enough" or "just as good" rule does not obtain in Oklahoma, and neither custom nor expediency may be resorted to as a route of escape for the contractor who has so signally failed to perform his contractual obligation. And it would tax the imagination of the most credulous to assume that the respondent did not know the type of foundation he was constructing, and that it would weaken the foundation to such an extent that the walls would settle, and destroy any plans the petitioners might or might not have, now or in the future, to add one or more additional stories to the building.

This was a deviation that could not be remedied except by tearing down the building and constructing an entirely new foundation in accordance with the specifications.

The respondent has a proper method of recovery for all moneys actually due to him, but he cannot legally recover anything in an action on a contract which was so flagrantly violated by him.

2. A fairly complete list of the deviations and omissions from the contract is shown in the testimony of Mr. Appleby (R. 43-48). Several of these, like the foundation, the inadequate central cooling system, the four outside wooden doors instead of two metallic doors, the 4-ply roof instead of the 5-ply roof, etc., were not agreed to as shown by uncontradicted testimony. As to others there was conflict in testimony. Petitioners said they were not

agreed to; respondent said they were, and the trial Court found they were agreed to. The Court of Appeals stated that such deviations and omissions were "waived". Both the trial Court and the Appellate Court refused to allow petitioners any credit on the contract price for savings effected by the deviations and omissions which the Court found were agreed to by the parties. In this holding, the trial Court and the Appellate Court were in error for two reasons: (1) because the contract between the parties provided (R.-41):

> "Art. III—The owner agrees to pay contractor in current funds for the performance of this contract, Twenty Thousand Dollars $20,000.00 to be paid as follows: Within thirty days after completion, or before, *subject to any additions or deductions* to the general conditions of the contract." (Emphasis ours.)

(2) The holding is in direct contravention of the Oklahoma construction of such a contract as expressed by the Supreme Court in *Mitchell* v. *Spurrier Lumber Co.*, *supra*, where in the second paragraph of the syllabus by the Court it is said:

> "If the defendant in error, through its agents, suggested certain changes as to the specifications and plans for the construction of a house, and the plaintiff in error consented to the same, and the same were accordingly made, he is bound thereby;
>
> "(a) If such changes in the plans reasonably operated to decrease the cost to the defendant in error in building the structure, the plaintiff in error should have the advantage of same."

In the body of the opinion this language is used:

> "Though the plaintiff in error may have acquiesced in the change in the plans, it does not follow that such acquiescence would mean that the contract price for the structure should remain the same. If the changes in plans reasonably operated to decrease the cost to the defendant in error of building the structure, the plaintiff in error should have the advantage of the same."

We have found no cases to the contrary. These credits would have been allowed petitioners if the case had been tried in a state court; they should under the law and under the decisions of this Honorable Court have been allowed in the Federal Courts. This error is highly prejudicial, and if not corrected, will cost these petitioners hundreds of dollars.

3. Negotiations for this contract covered several months, during which period ideas and plans as to construction changed from time to time until they finally ripened into the completed contract and specifications (R. 37-41).

During the period of negotiations as to plans, which finally ripened into the written contract and specifications, the use of the side walls and foundation of a building then on the site, and owned by petitioners, in constructing Srigley Clinic Building was discussed; but when the final contract and specifications were drawn and signed all idea of using any portion of the old building was discarded, and the contract was made to provide that the materials for

the building should be furnished by the contractor (Art. I, R. 41). But in spite of that fact, the respondent (the contractor) was allowed by the trial court to testify as to the preliminary conversations relative to constructing the new building by adding to the front and rear of the old building (R. 22). Upon objection by petitioners, the trial court asked if the conversation occurred prior to the written contract. Respondent's attorney answered Yes", whereupon the trial court overruled the objection, (R. 22). Upon that testimony was based the idea that respondent had a right to use the foundation and walls of the old building, in derogation of the written contract and specifications, and the further idea that petitioners were not entitled to credit for the savings effected by the use of parts of the foundation and walls of the old building. This was error upon the part of the trial court and concurred in by the Court of Appeals.

Such a holding is in conflict with the controlling statutes and decisions of the State of Oklahoma.

Title 15 § 157, Okla. Stats. 1951, reads:

> "The execution of a contract in writing, whether the law requires it to be in writing or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument."

The above statute has been construed to mean just what it says. *Kinnard-Haines Co.* v. *Dillingham*, 73 Okl. 129, 175 P. 208, and many other cases to the same effect.

The only exception to that rule is where the contract was procured by accident, fraud or mistake, or where it is ambiguous. No accident, fraud or mistake is pleaded, and could not be, since the respondent himself drew the plans and specifications (R. 30). They are clearly not ambiguous, and even if they were, they would be construed against the party who drew them.

This testimony was erroneously received, and acted upon to the prejudice of the petitioners to the extent that the court refused to give petitioners credit for the material used from the old building, which holding was concurred in by the Court of Appeals. It was error prejudicial to the petitioners.

4 (a) Attorneys for petitioners overlooked proving the amount of money saved by the contractor (respondent) in constructing a foundation little more than one third as heavy as the one called for by the specifications, and by unwarrantedly using an old light foundation of the owner which was already on the site.

The inference is to be drawn from the opinion of the Appellate Court that if this proof had been made, an additional credit for that amount would have been allowed by the Court of Appeals.

4 (b) The finding of the trial court that there was a subsequent oral agreement for the lengthening of the building was based entirely on the testimony of the contractor (categorically denied by the petitioner, O. Q. Kiz-

ziar). Respondent testified (R. 29) that about three weeks after construction on the Srigley Building started, he and Kizziar were in the front part of the building; that at that time the foundation of the front wall and the side walls back to the beginning of the old foundation had been poured and the walls were up to a height of about four feet; that no work had been done on the rear foundation or walls, and that no one was present except himself and Kizziar. Thereby he fixed the time, place and circumstances under which the alleged oral contract was made.

Attached to the motion to reopen for further testimony by the petitioners are the affidavits of Marvin Crelia (R. 104) who swore that the entire foundation was laid in December; that a rainy spell intervened, and that no part of the walls were laid until in 1957; that not a brick in the wall was laid until the entire foundation had been poured; and the affidavit of J. B. Allen, who swore that he hauled brick for the Srigley building; that the first load he hauled, bricks had been laid around the entire foundation, about two feet high.

4 (c) The specifications called for two outside metallic doors in the sides of the building; instead, the contractor installed four wooden doors (R. 26) which he said he installed at Dr. Srigley's request (R. 26). Mr. Kizziar testified he made no request for 4 wooden doors; Dr. Srigley's affidavit attached to the motion to reopen shows that Srigley made no such request (R. 102).

Respondent also testified that he omitted some medicine cabinets at the request of Dr. Srigley. In his affidavit (R. 102), Dr. Srigley says he made no such request.

4 (d) With reference to the second cause of action, plaintiff's contention was that the subcontract with J. M. Sturdevant for the air cooling system for the Irby-Bussey Clinic was not included in the contract price of $10,000.00. When confronted with the fact that Sturdevant had issued the invoice and the statement for payments to him, plaintiff tried to run to cover by testifying that by letting the invoice come through him, the owner, Kizziar, could save the contractor's commission. Judge Gore, one of plaintiff's attorneys, attached his affidavit to the motion to reopen (R. 103) showing that if the case should be reopened, Mr. Sturdevant would testify that when respondent purchased this cooling system, he, Sturdevant, was giving no commission to contractors, and that the respondent knew it.

4 (e) Respondent testified (R. 68) that on November 21, 1956, he borrowed $839.29 from the petitioner, Kizziar, and gave him a post-dated check for that amount on which payment was refused by the bank because of "insufficient funds": that later he repaid the loan in cash and that the check was torn up. Petitioner Kizziar testified that he made a loan of $839.29 to respondent and introduced a check by which he transferred that amount to respondent, and said that the loan had never been repaid. Kizziar denied respondent had given him a postdated check for

the loan. In petitioners' motion to reopen for additional testimony, they attached thereto a copy of the check given, not to him, but to Park Lane Pharmacy, dated November 21, 1956, not to repay a loan, but to pay "for drugs", on which payment was refused for "insufficient funds."

With the exception of the inadvertence of the attorneys with reference to the amount saved by the contractor in constructing the foundation as he did, all of these matters were newly discovered, and all of them bore upon the credibility—the truth or falsity—of the testimony as to material facts given by the respondent, Dollar—testimony which stood alone, corroborated by no one and denied by the petitioner, Kizziar.

The testimony was given at Lawton, Oklahoma, April 10, 1958; the trial was closed the next day. There was no time to go to Altus, about 60 miles away, find the testimony and return to Lawton for the opening of court the next morning.

This testimony of the respondent was unlooked for testimony, and could not have been foreseen. Nothing in the pleadings, proceedings or answers to interrogatories forewarned petitioners of such testimony.

Respondents failed to make proof as to the value of attorney fees in the case. A motion was filed on behalf of respondent to reopen for the purpose of producing such testimony. It was granted at the same time that petitioners' motion was denied.

By so ruling, the trial court failed to do justice between the parties, and thereby abused his judicial discretion, and the Court of Appeals committed error in failing to so hold.

This Honorable Court, in *Langnes* v. *Green*, 282 U. S. 520, 75 L. Ed. 520, announced the guiding precept as to judicial discretion in the following language (Headnote 7):

> "'Discretion' when invoked as a guide to judicial action means a sound discretion exercised, not arbitrarily or wilfully, but with regard to what is right and equitable, under the circumstances, and directed by reason and conscience of the judge to a just result."

In *St. L. & S. F. Ry. Co.* v. *Hurley*, 30 Okl. 833, 120 P. 568, paragraph 2 of the syllabus (by the Supreme Court) reads:

> "In an action for damages sustained for personal injuries, where judgment is rendered in favor of the injured party, and wherein the amount of damages is based upon the extent of the injuries, and where the only testimony as to the extent of the injuries is that of the interested party, and after conclusion of the trial new evidence is discovered, the existence of which clearly appears to have been unknown to movant before trial, and such evidence, if true, conclusively tends to show that the injuries were not serious, and that such judgment had been procured by deception and false testimony, HELD, it was error to refuse a new trial."

We submit that the trial court's action in denying petitioners' motion and the same request in the motion

for a new trial was an abuse of judicial discretion and that the Court of Appeals committed error in failing to so hold.

5. The Court of Appeals held that the trial Court committed error in allowing a credit of $750.00 for window air conditioners, when the contract and specifications called for an adequate central cooling system and also committed error in not allowing credit for certain minor items of deviation and omission illustrated in Footnote 2 to the Appellate Court's opinion, amounting to an additional credit of some $2500.00, and remanded the case to the trial court for further proceedings on these items. Petitioners filed their motion to assess the costs of appeal against respondents, which was denied.

We think the trial court erred in denying our motion. The law, as applied in a great majority of jurisdictions is that when appellant obtains a modification of the judgment against him in an appreciable amount, he will be entitled to his costs on appeal. In 12 Corpus Juris, Costs, § 618, the general rule is stated:

> "In perhaps the majority of jurisdictions, an appellant or plaintiff in error, who obtains a modification of a judgment * * * is entitled to costs on appeal, the view being taken that he is the prevailing party. * * *"

And the text is supported by decisions from various jurisdictions.

Respectfully submitted,

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OCTOBER, 1959

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

B. L. DOLLAR, an individual doing business as B. L. DOLLAR CONSTRUCTION COMPANY,

No. 7676-Civil

Plaintiff,

—vs—

O. Q. KIZZIAR and MILDRED KIZZIAR, his wife; and the UNITED STATES OF AMERICA,

Defendants.

J U D G M E N T

This cause came on for trial before the Court without a jury at Lawton, Oklahoma, on March 10-11, 1958, the plaintiff appearing in person and by his attorneys, Ross Rutherford and Harbison & Whiteside; the defendants, O. Q. Kizziar and Mildred Kizziar, appearing in person and by and through their attorneys, Gore & Gore and C. E. Hall; the defendant, the United States of America, appearing by its duly authorized representatives and by its attorney, Leonard Ralston, and the Intervenor, National Paving Company, a corporation, appearing by its duly authorized representative and by its attorneys, Yates & Braddock. All parties announced ready for trial and a jury being waived,

testimony was received by the Court and all parties having rested, the Court took the case under advisement. And the Court having considered all testimony and evidence as offered by the parties to this cause; having considered the briefs as filed herein by the plaintiff and defendants, O. Q. Kizziar and Mildred Kizziar, and having heretofore made and filed herein its Findings of Fact and Conclusions of Law, and Order for Judgment, now, pursuant to said Order for Judgment, it is by the Court ordered and adjudged as follows:

(a) That the plaintiff, B. L. Dollar, an individual doing business as Dollar Construction Company, have judgment against the defendant, O. Q. Kizziar, on the first cause of action set forth and alleged in plaintiff's petition, as herein filed, for the total sum of $21,963.50 with interest thereon at the rate of 6 per cent per annum from May 4, 1957, and for his costs and disbursements in this action, including a reasonable attorneys' fee to plaintiff's attorneys, which said costs and attorneys' fees are to be hereinafter taxed, on notice, and hereinafter inserted by the Clerk of this Court in the sum of $2500.00.

(b) That said plaintiff, B. L. Dollar, have judgment against the defendant, O. Q. Kizziar, on the second cause of action set forth and alleged in plaintiff's petition, as herein filed, for the total sum of $902.60, with interest thereon at 6 per cent per annum from November 21, 1956.

(c) That the intervenor, National Paving Company, a corporation, have judgment against the defendant, O. Q. Kizziar, for the principal sum of $293.20 with interest thereon at 6 per cent per annum from May 15, 1957, and for its costs and disbursements in this action, including a reasonable attorneys' fee to Intervenor's attorneys, which said costs and said attorneys' fee are to be hereinafter taxed, on notice, and hereinafter inserted by the Clerk of this Court in the sum of $29.32.

(d) That the plaintiff, B. L. Dollar, holds a valid and subsisting materialmen's and mechanics' lien upon and against the whole of the interest of the defendants', O. Q. Kizziar and Mildred Kizziar, in and to the

West 50 feet of Lot 20, Block 1, Hightower Park Addition to the City of Altus, Oklahoma,

for the sum of $21,963.50, with interest thereon at 6 per cent per annum from May 4, 1957, together with the costs of this action; that the right, lien and claim of said plaintiff in and to said premises is, by virtue of said lien, prior and superior to any right, claim, interest or title of said defendants, O. Q. Kizziar and Mildred Kizziar, in and to said premises or any part thereof, and that said plaintiff is now entitled to the foreclosure thereof.

(e) That the intervenor, National Paving Company, a corporation, holds a valid and subsisting mechanics' and materialmen's lien upon and against the whole of the in-

terest of the defendants, O. Q. Kizziar and Mildred Kizziar, in and to the

West 50 fet of Lot 20, Block 1, Hightower Park Addition to the City of Altus, Oklahoma,

for the sum of $293.20 with interest thereon at 6 per cent per annum from May 15, 1957, together with its costs as herein taxed and accrued; that the right, lien and claim of said Intervenor, in and to said premises is, by virtue of said lien, prior and superior to any right, claim, interest or title of the defendants, O. Q. Kizziar and Mildred Kizziar, in and to said premises or any part thereof, and that said Intervenor is now entitled to the foreclosure thereof.

(f) That the defendant, the United States of America, holds a valid lien for Federal Withholding Insurance and Excise Taxes covering the whole of the interest of the said O. Q. Kizziar in and to the real property hereinbefore described, in the principal sum of $3,336.20, with interest and costs thereon accrued, which said lien of said defendant is prior and superior to the mechanics' and materialmen's lien of the plaintiff and the Intervenor herein, as to the interest of the defendant, O. Q. Kizziar, in and to said premises.

(g) That the plaintiff and Intervenor herein are entitled to a marshaling of assets by reason whereof it is by the Court ordered that the defendant, the United States of America, first proceed against any and all property of

the defendant, O. Q. Kizziar, including particularly, but not being limited to:

(a) A stock of merchandise and drug store fixtures comprising the Broadway Drug Store as located at 821 East Broadway, Altus, Oklahoma.

(b) A stock of merchandise and drug store fixtures comprising the Park Lane Drug Store as located at 100 South Park Lane, Altus, Oklahoma.

(c) The West 26 feet of the South 100 feet of Lot 6, Block 3, Hightower Place Addition to the City of Altus, Oklahoma, upon which has been constructed a medical clinic building known and referred to as the Irby-Bussey Clinic of Altus, Oklahoma.

(d) An undivided 1/7th interest in and to the East Half of Section 3, Township 2 North of Range 22 West of the I. M.,

upon which said defendant, the United States of America, holds a lien and on which said plaintiff and said Intervenor hold no lien, for the satisfaction of the tax lien of the United States of America, before resorting to the interest of the defendant, O. Q. Kizziar, in and to the property as specifically hereinbefore described, for the satisfaction of the lien of said defendant, the United States of America.

(h) That L. A. Goodwin is the owner of a first mortgage lien on the

West 50 feet of Lot 20, Block 1, Hightower Park Addition to the City of Altus, Oklahoma.

upon which there is a balance owing of approximately $8,200.00 with interest thereon accrued and that all foreclosure sale proceedings conducted herein in pursuance of

this judgment should be made subject to the first mortgage lien of the said L. A. Goodwin.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that the materialmen's and mechanics' liens of the plaintiff, B. L. Dollar, and the Intervenor, National Paving Company, a corporation covering the

> West 50 feet of Lot 20, Block 1, Hightower Park Addition to the City of Altus, Oklahoma,

be and the same are hereby foreclosed as by law provided, and it is by the Court ordered that said property be sold, upon execution and order of sale to be issued herein, subject to a first mortgage thereon as owned and held by L. A. Goodwin, and the proceeds of any such sale applied as follows:

(1) To the payment of costs of said sale and the costs of this action.

(2) To the payment of such balance, if any, as may then be owing the United States of America upon its lien for Federal Withholding Insurance and Excise taxes in the principal sum of $5,336.20, with interest and costs thereon accrued.

(3) To the payment to the plaintiff, B. L. Dollar, of the sum of $21,963.50, with interest thereon at 6 per cent per annum from May 4, 1957, and to the payment to the Intervenor, National Paving Company, of the sum of $293.20, with interest thereon at 6 per cent per annum from May 15, 1957, on a pro rata basis, it being by the Court ordered that from the funds so received said plaintiff shall first pay all balances as then owing by him to the following named materialmen and subcontractors and those furnishing

money for the improvement of the above described premises, to-wit:

International Paper Company, as Successor to Long Bell Lumber Company, a corporation	$ 183.63
Clarence H. Corey, d/b/a, Altus Glass Company	378.00
Cameron Lumber Company, a corporation	4,667.94
Fagan Plumbing Company, a copartnership	279.60
R. B. Thomas, d/b/a R. B. Thomas Co.	500.00
Geo. C. Wright Lumber Co., a corporation	613.18
Hammond Concrete Company	758.54
Southwest Metal & Trade Company	167.00
Eddie Brinkman, d/b/a Brinkman Electric Co.	2,237.12
Promissory Note owing Dr. R. S. Srigley for the principal sum of	3,500.00

(4) And any residue remaining to be paid as the Court may direct.

IT IS SO ORDERED.

Ross Rizley
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5987, May Term, 1959

O. Q. KIZZIAR AND MILDRED KIZZIAR, his wife,

Appellants

—vs—

B. L. DOLLAR, an individual doing business as B. L. DOLLAR CONSTRUCTION COMPANY,

Appellee.

(July 23, 1959)

C. E. Hall, Oklahoma City, Oklahoma, (E. E. Gore and W. H. Gore, Altus, Oklahoma, were with him on the brief) for Appellants.

Robert B. Harbinson, Altus, Oklahoma, (Ross Rutherford and Harbinson & Whiteside, Altus, Oklahoma, were with him on the brief) for Appellee.

Before MURRAH, PICKETT AND BREITENSTEIN, PICKETT, Circuit Judge.

On November 12, 1956 the plaintiff and the defendant, O. Q. Kizziar, entered into a written contract whereby the plaintiff agreed to construct a building on property owned by the defendant and his wife for an agreed price of $20,000.00. This action was brought to recover the full amount due on the contract and an additional sum of $2,863.50 alleged to be due on a subsequent oral contract for an enlargement of the building as originally planned. The plaintiff also sought the foreclosure of a mechanics' and materialmen's lien on the property and the recovery of a reasonable attorney fee for enforcing the lien. As a separate cause of action, plaintiff requested judgment for the balance which Kizziar allegedly owed him on a former contract. The case was tried without a jury, and the court found for the plaintiff on the written and oral contracts

for the first cause of action, and entered judgment in the requested amounts less certain deductions. The court also ordered the lien foreclosed by the sale of the property and allowed $2,500.00 for costs and attorney fees. Judgment was also entered in favor of the plaintiff for $902.60, the full amount alleged to be due on the former contract.

With regard to the first cause of action, the defendants urge that the written contract sued upon was entire and indivisible and that performance by the plaintiff was insufficient to permit recovery thereon. The law is settled in Oklahoma that when a contractor and builder has in good faith endeavored to comply with the terms of a contract, literal compliance in all details is not essential to recovery, especially where the owner has taken possession of the building. In *Robinson* v. *Beaty*, 75 Okl. 69, 181 P. 941, 942, the Oklahoma Supreme Court said:

> "Since the rule of exact or literal preformance has been relaxed, literal compliance with a building contract is not essential to a recovery thereon, but a performance thereof in all its material and substantial particulars is sufficient."

There is substantial performance when the builder has in good faith intended to perform his part of the contract and has done so in the sense that the building is substantially what is provided for, and there are no omissions or deviations from the general plan which cannot be remedied without difficulty. 3 Williston, Contracts, § 842 (Rev. Ed. 1936); Restatement, Contracts, § 275; 9 Am.

Jur., Building and Construction Contracts, § 42; Words and Phrases, Vol. 40, Substantial Performance.

When there has been substantial performance, the measure of recovery is the amount stipulated in the agreement less the reasonable cost of remedying defects and omissions to make the building conform to the contract. *Klein* v. *Moore*, 202 Okl. 88, 210 P. 2d 363; *Busboom* v. *Smith*, 199 Okl. 688, 191 P. 2d 198, and cases there cited. In *Lane* v. *F. S. Miller Lumber Co.*, 101 Okl. 14, 222 P. 968, 969, the court quoted with approval from *Kelley* v. *Hamilton*, 78 Okl. 179, 189 P. 585, as follows:

> "A contractor and builder who has in good faith endeavored to perform all that is required of him by the terms of his contract for the construction of a building, and has in fact substantially performed the same, is ordinarily entitled to sue upon his contract and recover the contract price less proper deductions therefrom on account of omissions and deviations and defects chargeable to him, especially where the owner occupies and uses such building."

See also 9 Am Jur, Building and Construction Contracts, §§ 40, 43; Ann. 38 A. L. R. 1383; Anno. 65 A. L. R. 1297.

There is no indication of bad faith on the part of the plaintiff, and from an examination of the record, we are satisfied there was substantial performance of the contract on his part. The building in question was constructed for use as a medical clinic and the defendant's lessee has oc-

cupied it since the first part of April, 1957.[1] During the construction numerous changes in the plans were made at the request of the lessee and the defendants.

The trial court found that all of the deviations from the specifications except two were authorized by subsequent agreement of the parties. The two exceptions relate to the roof and the heating and air-conditioning equipment. The plans and specifications required what was described as a "5-ply built-up roof". The roof installed was a 4-ply and the court allowed a deduction of $150.00 which, according to the evidence, would be the reasonable cost of placing an additional ply on the roof. The specifications provided for a central heating and airconditioning system "ducted in". The system was to be Chrysler Air Temp or its equal, with an air duct into each room, but the size of the unit was not specified. It is agreed that the type of heating and air conditioning unit installed was equal to the Chrysler product, but the court found that the system was inadequate to properly cool the building. The court also found that the deficiency could be overcome by the installation of window air conditioners at a cost of $750.00, and allowed that amount as a deduction from the contract

1. The court made this finding:

"16. That during the whole of the period of construction of said Srigley Clinic building, the defendant Mildred Kizziar, had full knowledge thereof, and advised with the plaintiff from time to time, as to various features of said construction, and that upon completion of said building and in the month of April, 1957, the defendants O. Q. Kizziar and Mildred Kizziar, entered into possession of said building, and have since accepted the rental benefits accruing therefrom."

price. There was evidence that Kizziar approved the use of the particular make of heating and cooling system which was installed, but that approval would not authorize the installation of a system which was of a different type than that specified or which was inadequate for its intended purpose. The defendants are paying for and are entitled to a central system with sufficient capacity to heat and cool the building in a reasonable manner, and the court should have determined and made allowance for the additional cost to provide such a system. *Mitchell* v. *Spurrier Lumber Co.*, 31 Okl. 834, 124 P. 10.

We think the evidence sustains the findings that a number of the remaining variations, alterations and adjustments were authorized by subsequent agreement of the parties. There are, however, some items required by the contract specifications which were not completed or installed and which were not waived.[2] For the contract price, the defendants were entitled to a completed building. Unless this failure resulted solely from defendant's conduct which prevented completion, there should have been an allowance for the necessary cost of completing the building as planned.

Complaint is made that the foundation did not meet the specifications and that the variance was not authorized.

2. These include such minor items as unfinished painting, cleaning of tile floors, omissions of certain moulding, bathroom locks, medicine cabinets, etc., The items to be allowed shall be limited to those found to be required by the contract and may be determined from the record or from additional evidence, or both.

The evidence is without conflict that the foundation, although not equal to that specified, was standard and adequate for this type of building. No evidence was introduced at the trial as to the cost of providing a foundation equal to the specifications. In the absence of a showing that the foundation was to be of certain specifications for a particular reason, the plaintiff having provided one that was standard and adequate for the building, the requirements of the substantial performance rule are satisfied.

Defendants contend that the trial court erred in finding that the parties entered into an oral contract for a building larger than the one contemplated by the written contract. As to the existence of this oral agreement, the evidence is in direct conflict. The plaintiff testified that the building, as originally proposed, was to be 70' in length and 35' in width; that after construction was started it was agreed between the parties that the length of the building should be extended to 77' at an additional cost of $2,863.50. Defendants deny that any such agreement was entered into. The doctor who was to occupy the building testified that it was his original understanding that that building was to be 70' x 35' and that he was pleased to hear of the extension. There is other evidence which tends to support the oral agreement, consequently the finding is not clearly erroneous.

Before construction was commenced, the lessee of a portion of the premises advanced the sum of $3,500.00

to the plaintiff and accepted a promissory note signed by the plaintiff and the defendant, O. Q. Kizziar. Defendant contends that he should have been given credit on the judgment for this amount.[3] The trial court recognized plaintiff's primary liability on the note and directed that it be paid from the proceeds of the lien foreclosure sale. The plaintiff and the defendant O. Q. Kizziar are liable on the note and each is entitled to be protected against double payment. As all parties agree that the note should be paid from the judgment funds, we are satisfied that the court, the parties, and their attorneys, will devise a method to protect all concerned.

The defendants challenge the allowance of a $2,500.00 attorney fee to plaintiff. 42 O. S. A. § 176 provides that in an action to enforce any lien, the party for whom judgment is entered shall be entitled to a reasonable attorney fee to be fixed by the court and taxed as costs. A lien claimant recovering judgment against the owner of a building for material and services is entitled to recover a reasonable attorney fee under the statute. *Grissom* v. *Frensley Bros. Lumber Co.*, 192 Okl. 413, 136 P. 2d 887. The plaintiff alleged in his complaint that the reasonable attorney fee was $2,000.00 for the foreclosure of the lien. Defendants contend that the court erred in allowing a $2,500.00 fee

3. The lessee testified that he had not paid the defendants any rentals but had credited them on the $3,500.00 note. The plaintiff concedes that defendant, O. Q. Kizziar, is entitled to credit for any amount he has paid on the note by allowance of rental credits or otherwise.

and that the judgment should have been reduced to $2,000.00. The plaintiff filed a motion requesting that a reasonable attorney fee be fixed by order of the court and taxed as costs. There was a hearing upon this motion which resulted in the allowance of a $2,500.00 attorney fee. The evidence in support of the motion is not in the record, and we must assume that it was sufficient to support the allowance. The plaintiff would not be bound by the $2,000.00 allegation, and if the evidence was sufficient to sustain the higher award, the complaint would be considered amended to conform to the proof. Fed. Rules Civ. Proc., 15 (b); *C. I. R.* v. *Finley*, 10 Cir., 265 F. 2d 885; *Decker* v. *Korth*, 10 Cir., 219 F. 2d 732, certiorari denied, 350 U. S. 830; *Underwriters Salvage Co.* v. *Davis & Shaw Furniture Co.*, 10 Cir., 198 F. 2d 450.

The second cause of action in plaintiff's complaint is for the balance due on a previous contract between the same parties. The evidence as to the amount paid or credited is conflicting. The determination of the issue depended upon the credibility which the trial court attributed to the testimony of the various witnesses. There is no merit to the contention that there is insufficient evidence to sustain the $902.60 judgment entered by the court.

Prior to entry of the judgment the defendant filed motions for a new trial and to "open judgment for additional evidence". The denial of these motions is assigned as error. The purpose of the motions was to permit the

introduction of newly discovered evidence "which shows material statements of plaintiff were not true", and "if believed by the court, would substantially prove that" the judgment should be modified, corrected or amended. Motions of this nature are addressed to the sound discretion of the trial court and a denial will be disturbed only when clearly erroneous. *Roberts* v. *Sawyer*, 10 Cir., 252 F. 2d 286; *Harrington* v. *Swanson*, 10 Cir., 249 F. 2d 640; *Patterson* v. *National Life & Accident Ins. Co.*, 6 Cir., 183 F. 2d 745; *Trapp* v. *United States*, 10 Cir., 177 F. 2d 1, certiorari denied 339 U. S. 913. We find no abuse of discretion in the action of the court in disposing of these motions.

The case is remanded for additional findings in accordance with the views herein expressed and a modification of the judgment accordingly.

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NOV 9 1959
JAMES R. BROWNING, Clerk

In The
Supreme Court of the United States

October Term, 1959

No. 478

O. Q. KIZZIAR AND MILDRED KIZZIAR, his wife,
Petitioners,

VERSUS

B. L. DOLLAR, doing business as B. L. DOLLAR CONSTRUCTION COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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of Counsel.

NOVEMBER, 1959.

KING LAW BRIEF CO., COMMERCE EXCHANGE BLDG. OKLAHOMA CITY—PHONE CE 5-2969

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Respondent.

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STATEMENT OF CASE

This cause involves a simple argument between the petitioners, Kizziar and wife, and the respondent, Dollar, over the agreed contract price for the construction by respondent on the property of petitioners of a medical office building. Dollar instituted a lien foreclosure action in a state court for the construction costs, and it is only

by a rather anomalous factual situation that the case now appears in the Federal courts.

Shortly after institution of the lien foreclosure action in state court, the United States filed against Kizziar a Notice of Tax Lien thereby disclosing the failure of Kizziar, over a course of two or three years, to remit to the government the social security and income taxes as withheld by him from the salaries of his employees. Dollar thereupon joined the United States as a party defendant in his lien foreclosure action, whereupon the cause was removed to the Federal Court by the United States.

The cause was tried in the Federal District Court resulting in judgment in favor of respondent. Petitioners thereupon appealed to the Circuit Court of Appeals. The Circuit Court denied all major contentions of the petitioners and affirmed the judgment of the District Court but remanded the cause for further factual findings and modification of the judgment in two minor particulars. Pending determination of the appeal in the Circuit Court the tax item owing the United States was paid by Kizziar and the United States is no longer interested in this cause. From the judgment of the Circuit Court of Appeals petitioners now seek writ of *certiorari*.

ARGUMENT

Respondent readily concedes as stated by petitioners in their Petition, that this cause is properly to be de-

termined in accordance with the laws of the State of Oklahoma. The written and oral contracts here in litigation were Oklahoma contracts and the liabilities arising thereon are to be determined in the light of the statutory law of Oklahoma, and the decisions of its highest court. As stated, but for the once prevailing but now non-existant interest of the United States in the cause, the case would have never reached the Federal courts.

Construction Contract Indivisible

By their Petition, petitioners assert that the construction contract here in question was an entire, indivisible contract which was not substantially performed by reason whereof the District Court erred in granting respondent any judgment thereon, and the Circuit Court erred in affirming same. Petitioners, in effect, thus assert that the building as here constructed by Dollar on their property should be given to them free of cost by denying to Dollar his agreed costs of construction. This petitioners do in the face of the evaluation of this building by Kizziar, after its completion, at the sum of $28,000.00 (R. 51). The law of Oklahoma, or any other state, justifiably gives no heed to such an inequitable position as is thus assumed by petitioners.

Beginning in the District Court and throughout their appeal to the Circuit Court petitioners have urged upon the court the decisions of the Oklahoma court as set forth

in their petition as herein filed. The District Court, after a detailed trial, found that the respondent, Dollar, had substantially complied with his contract of construction, made allowance for the two minor particulars in which a departure from substantial compliance was found to exist, and rendered judgment accordingly. The Circuit Court affirmed the trial court in all material respects and remanded the cause for further factual findings on two minor details, and possible modification of the judgment to conform to the change of findings of fact, if any. Both the decisions of the District Court and the Circuit Court on appeal, as stated therein, were rendered in the light of the statutory rules of law and the interpretation thereof as enunciated by the Supreme Court of Oklahoma.

Petitioners here contend for a literal compliance with the terms of the construction contract here in question. The law of the State of Oklahoma in construing the rights of the parties under a construction contract such as is here in question, is very clear.

In the case of *Robinson* v. *Beaty*, 75 Okl. 69, 181 P. 911, the Oklahoma Court ruled:

> "Since the rule of exact or literal performance has been relaxed, literal compliance with a building contract is not essential to a recovery thereon, but a performance thereof in all its material and substantial particulars is sufficient."

In the case of *Lane* v. *Miller*, 101 Okl. 14, 222 P. 968, the Oklahoma Court ruled:

"A contractor, who has in good faith endeavored to perform all that is required of him by the terms of his contract for the construction of a building, and has in fact substantially performed the same, is ordinarily entitled to sue upon his contract and recover the contract price less proper deductions therefrom on account of omissions, deviations, and defects, chargeable to him, especially where the owner occupies and uses such building. Evidence tending to prove a substantial performance of the contract and a faithful endeavor on the part of the builder to perform all the terms of the contract is admissible."

In 9 Amer. Juris. Page 30, the general rule supported by the opinions of the appellate courts of virtually every State of the Union and of the federal courts, and the equitable reasons supporting the same, are stated as follows:

"The American courts are united in holding that a substantial performance of a building contract will support a recovery either on the contract or on a *quantum meruit* basis.

"Three reasons are given for the rule that a substantial performance of a building contract will support recovery. The first is that the work on a building is such that even if rejected the owner of the land must receive the benefit of the contractor's labor and materials, which is not the case where a chattel is constructed as the chattel may be returned. Since the owner must receive the fruits of the builder's labor, it is deemed equitable to require the former to pay for what he gets * * * The second reason is that it is next to impossible for a builder to comply literally with all the minute specifications in a building contract. The third reason is that the parties are presumed to have impliedly agreed to do what is

reasonable under all the circumstances with reference to the subject of performance."

A review of the findings of fact and the judgment of the trial court and a review of the opinion as rendered herein by the Circuit Court on appeal discloses that this cause has been determined in the light of the statutory law and the decisions of the highest court of the State of Oklahoma, as petitioners, by their Petition, assert should have been done. And, in the light of the law of the State of Oklahoma, the District Court made factual findings completely supporting its judgment of substantial compliance, which judgment, in all material respects, was affirmed by the Circuit Court. Respondent thus respectfully urges that petitioners are without right of complaint on the issue here raised.

Claimed Credits

Petitioners further urge that factually they were entitled to certain credits not granted by the trial court in the form of alleged savings experienced by Dollar in alleged deviations and omissions from the terms of the construction contract. This contention on the part of petitioners was considered in detail by both the trial court and the Circuit Court on appeal. The trial court found that Kizziar agreed to all such changes except in two instances for which the trial court made proper allowance. It is conceded by respondent that departures were made

from the terms of the construction contract—some at a savings to Dollar—some at greater expense to him. For instance Dollar installed light fixtures of a value in excess of $700.00, whereas the specifications provided that Kizziar would furnish all light fixtures in excess of $100.00 (R. 26). Dollar, at a greater expense to himself, installed five outside doors, whereas the specifications called for only three (R. 46). Dollar, at a greater expense to himself, installed accoustical ceiling rather than celotex as called for by the specifications (R. 26). In common fairness petitioners should concede credits for those items which they received which were above specifications, and not complain solely about the items which amounted to immaterial departures therefrom, and as to which the trial court found they agreed prior to such changes being made. The issue here raised would require a review of all evidence and a discussion of all specific facts pertaining thereto. It has been ruled by this Honorable Court that *certiorari* will not be granted merely to review the evidence or inferences drawn therefrom. *U. S. General Talking Pictures Corp.* v. *Western Elect. Co.*, 58 S. Ct. 849, 304 U. S. 175, 546, 82 L. Ed. 1273.

Erroneous Admission of Evidence

At page 15 of their Petition, petitioners urge that the trial court erred in admitting in evidence a certain conversation between the petitioner, Kizziar, and the respond-

ent, Dollar, concerning plans of construction of the building in question. This objection apparently comes as an afterthought on the part of the petitioners in that as reflected by the record (R. 2-5), no assignment of error was made thereon by petitioners in their appeal before the Circuit Court of Appeals. The oft-repeated rule of all appellate courts has been and is that assignments of error not properly alleged on appeal are thereby waived. Further, the petitioners do not point out any prejudice to their cause by the admission of such testimony. It is accordingly respectfully urged that the complaint as here made by petitioners does not justify granting the writ of *certiorari* as herein sought.

Reopening of Judgment

Petitioners further complain that error was committed in the refusal of the trial court to reopen the case, after judgment, for the purpose of receiving additional testimony upon the part of the petitioners. In support of petitioners' motion to reopen the case for further testimony there were attached various affidavits from witnesses, all of whom had testified in behalf of the petitioners at the trial of the cause. At most, the affidavit proof as offered in support of petitioners' motion to reopen the judgment was merely cumlative of evidence that had been offered by petitioners during the trial. In any event, the named witnesses whom petitioners now contend should have been

heard after the trial were all available to petitioners before and during the trial. It is respectfully submitted that litigation would be interminable if, after a fair and thorough hearing such as was here granted by the trial court, extending as it did over a period of two full days, in addition to consideration of approximately 150 pages of proof offered by deposition, the trial court would be required to open the cause and hear additional cumulative testimony on controverted factual issues theretofore determined. The law does not require such of any trial court. Rather the rule is that the ruling of the trial court on such a motion will not be disturbed on appeal except for abuse of discretion. Certainly in refusing to hear further cumulative testimony, after the patient and thorough hearing accorded the petitioners in the court below, the trial court did not abuse its discretionary power.

Assessment of Costs on Appeal

By their petition, petitioners further complain that the Circuit Court erred in refusing to assess petitioners' costs of appeal against respondent.

Rule 26 of the Circuit Court of Appeals of the Tenth Circuit provides that in case of affirmance of any judgment costs would be allowed the appellee; whereas, in cases of reversal costs would be allowed the appellant unless otherwise ordered by the court.

It has long been recognized that both trial and appellate courts have wide discretion in the taxing of costs. The broad, basic rule is that costs are allowed the "prevailing" party. Rule 54 (d) of the Federal Rules of Civil Procedure expressly so provides. That the petitioners here do not consider themselves as having been the "prevailing" party in the Circuit Court is adequately established by the fact that it was the petitioners here who filed a petition for rehearing before the Circuit Court, and it is the same petitioners who here seek to appeal from the order and judgment of the Circuit Court. And it has been repeatedly held that "* * * the 'prevailing party' to whom costs are awarded is the one in whose favor judgment is entered, and he need not have received his entire claim." (See *Brown* v. *Consolidated Fisheries*, 8 F. R. D. 433, *Ex Parte Peterson*, 253 U. S. 300, 64 L. Ed. 919.

CONCLUSION

As disclosed by the record of this cause (R. 35-36) the petitioner, Kizziar, conceded to others his indebtedness to Dollar but stated that it would require at least ten years for Dollar to collect the obligation. In view thereof, and in the light of the record of this cause as a whole there is much to support the view that petitioners' primary motive in the proceedings now before this Honorable Court is that of harassment of the respondent. It is apparent that the petitioners have used and are yet attempting to

use courses of delay to avoid their just obligation. With such spirit prevailing on the part of petitioners, in the light of usage, practice and justice, the respondent respectfully submits that this Honorable Court should deny to petitioners the issuance of the writ of *certiorari* as here sought, and dismiss this proceeding.

Respectfully submitted,

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NOVEMBER, 1959.